88-868

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

JAMES A. BRINGLE and
NORMA L. BRINGLE, Petitioners,

vs.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES, et al., Respondent.

PETITION
FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS STATE
OF WASHINGTON DIVISION II

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40pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Bringles and their Grandchildren possess a "liberty interest" in maintaining the stability and integrity of their familial relationship?

2. Should due process protection be extended to the type of family that the Bringles and their Grandchildren present?

3. Did the Superior Court State of Washington violate the Bringles due process and equal protection of law rights, by not allowing them to participate in the review hearing and by denying their motion to intervene and be heard?

4. Did the procedures used by the State to remove the Bringles grandchildren from their home adequately protect the due process rights of the Bringles and their grandchildren?

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INTRODUCTORY PRAYER

Petitioners, James A. Bringle and Norma L. Bringle, petitions this Honorable Court for Writ of Certiorari to the Washington State Court of Appeals Division II reviewing the judgement entered May 18, 1988, affirming the judgement of the Washington State Superior Court In and For the County of Pierce. No. 131566 and No. 131567, Re. The Welfare of Patrick James Bollinger and Jennifer Lynn Bollinger, October 28, 1986.

OPINIONS BELOW

The original judgement is not reported, but is Case No. 131566 and 131567 (In Re. Bollinger). The Court of Appeals Opinion affirming the original judgement is reproduced in the appendix. No. 10700-7-II and 10701-5-II Court of Appeals Division II State of Washington filed May 18, 1988.

JURISDICTION

The denial of review by the Washington State Supreme Court was entered on September 1, 1988. This petition has been filed within 90 days of that date pursuant to Supreme Court Rule 20.2. The jurisdiction of this Court is invoked under Title 28 U.S.C. & 1257 (a).

STATUTES INVOLVED

This Petition involves the Washington State Statutes 74.12.310RCW, 74.12.320RCW and 13.04.070RCW (Removal of dependent children from homes of relatives who are recieving Aid to Families with Dependent Children). Washington Court Rule CR 24 (a) (intervention as a matter of right).

CONSTITUTIONAL PROVISIONS

Equal Protection and due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

The Petitioners James A. Bringle and Norma L. Bringle are the Maternal Grandparents of Patrick James Bollinger and Jennifer Lynn Bollinger. On August 24, 1985 Patrick and Jennifer were placed with the Bringles for the purpose of adoption. This placement was made after a favorable home study and after the Washington State Court determined it was in the childrens best interest. The Children and their grandparents then lived together as a family for one year. Then on August 14, 1986 the Bringles were served in their home in California with court orders from Washington State Superior Court to remove their grandchildren from their home and transport back to the State of Washington to be adopted by strangers. The orders were the result of a review hearing that was held on June 24, 1986. The Bringles were not advised of this hearing and no opportunity to be heard was given either in Washington or in

California. The Bringles were also not advised of any rights or given any written reasons for removal. The Bringles filed a X-Parte petition in the California Courts to try and restrain Washington from removing the children until they had a opportunity to be heard. The California courts declined to take jurisdiction on August 19, 1986 and the children were removed that same day. The Bringles then filed a complaint with the California Department of Social health Services and a meeting was held approximately 3 weeks later on September 10, 1986. The California authorities said the removal was against their wishes and that they were not responsible that Washington was. Then on September 13, 1986 the Bringles recieved a letter from the Washington States Attorney Generals office dated September 11, 1986 explaining who was responsible for the Childrens removal. The Bringles immediately filed 3 days later on September 16, 1986 in the Washington State Superior Court

a motion to have the June 24, 1986 review hearing orders vacated. This motion was denied by order dated October 28, 1986, the orders stated we were not entitled to notice and had no right to intervene. Motion for revision was denied by order dated January 23, 1987. Order was affirmed by Court of Appeals opinion filed May 18, 1988. Notice of appeal To the Washington State Supreme Court was filed on June 8, 1988. Review was denied by the Washington State Supreme Court on September 1, 1988. The Bringles argued they had special circumstances that would require due process protection and in the court of first instance pointed them out. The State did not agree and argued that the Bringles lacked any legal standing and had no interest other than what was vested by the state. In the Court of appeals the Bringles argued that their Constitutional rights had been violated and cited several Federal Cases in support, they also argued they were entitled to

notice and hearing and that intervention was a matter of right. The state did not agree and ruled the Bringles were not entitled to a notice and intervention was a matter of the courts discretion. In the appeal to the State Supreme Court the Bringles specifically asked the court to rule wether or not they possessed a liberty interest that was protectable under the due process clause. However the State Supreme court denied review without comment. This appeal ensued.

REASONS FOR GRANTING CERTIORARI

The Washington States Courts refusal to provide Due Process Protection to the Petitioners and their Grandchildren and their refusal to recognize they constituted a family with a liberty interest in protecting their relationship conflicts with the Federal Court of Appeals decision in River v. Marcus 696 F.2d. 1016 (1982) (2nd Cir). The Rivera case thoroughly analized the liberty interest and due process rights of a Custodial

relative similar to the Bringles. This case also presents issues of important Constitutional rights that have not been decided by this Court, but should be. This case also presents important elements that were identified, (but not resolved) in the United States Supreme Court Cases involving Smith v. OFFER, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed. 2d. 14 (1977); Sherrard v. Owens, 484 F. Supp. 728 (W.D. 12, 14 Mich. 1980) aff'd 644 F2d 542 (6th circ.) (per curiam) cert. denied, 454 U.S. 823, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981); Drummond v. Fulton County Department of Family and children Services, 563 F2d 1200, 1207 (5th circ. 1977) (en banc), cert denied, 437 U.S. 910, 98 S.Ct. 3103 57 L.Ed.2d 1141 (1978). The important elements necessary for due process protection that were identified in the above cases are present in this case. The Petitioners in this case are biologically related and their relationship was expected to

lead to adoption. Another exceptional need for this Courts review is that the administration of the Washington State Courts has been unreasonable, and violates the Petitioners equal protection and due process rights. It would not have over burdened the State to provide a hearing for the Bringles and their grandchildren. The family unit is the most important of all Social Structures in our Society and should be entitled to vigorous due process protection before the State intervenes and decides that they can no longer live together as a family and permanently terminates their relationship. This case does not present the typical Foster home removal situation. Unlike the typical foster relationship, the Bringles are biologically related as grandparents. Moreover the familial relationship between the Bringles and their grandchildren was established before any court order. Their extended fam-

ily was not created by the State but was natural in orgin, also there is no conflict with the interest of the natural parents in this case, because the parents had relinguished their parental rights. Furthermore the natural parents had requested that the Bringles be allowed to raise their children. The Washington State Department of Social Health Services does not have any procedural safegaurds at the administrative level that would provide due process to the Bringles. This makes it even more important that the State Courts provide a opportunity for them to be heard. The Supreme Court has frequently re-affirmed that "freedom of personal choice in family matters of family life is one of the liberties protected by the due process clause of the fourteenth amendment. The Constitutional conception of "family" has evolved to include

relationships among members of what has commonly become known as the "extended family". See Moore v. City of East Cleveland, 431 U.S. at 496-506,97 S.Ct. at 1934-1939 (a grandmother and her two grandsons); Prince v. massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88L.Ed. 645 (1944) (an Aunt and legal gaurdian of her niece). The Courts have focused principally on the biological relationship between the parties when extending due process protections to persons not specifically fitting the parent child mold. In Moore v. City of East Cleveland the Court stated:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially Grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of Constitutional recognition.----

431 U.S. at 504-05, 97 S.Ct. at 1938.

The Bringles should have been viewed by the State of Washington as an extended family who were entitled to due process protection. The United States Supreme Court Case in Smith v. OFFER, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed. 2d 14 (1977), identified three important differences between the typical foster family and the natural family. First there is generally no biological relationship between foster parents and the children in their care. Moreover, while the natural family has its origins separate and apart from state law, the source of the foster family relationship is contractual in nature and is carefully circumscribed by the state in the foster care agreement. Finally, there is a virtually unavoidable tension between protecting the liberty interests of the natural

parents while also extending familial rights in favor of foster parents. This case is quite different, however, from the typical foster removal case. None of the factors weighing against the finding of a liberty interest in favor of foster parents is present in this case. The Bringles are related biologically to Patrick and Jennifer. They lived together as a family prior to any agreement with the state. Finally there is not the potential for conflict with the rights of the natural parents as they have relinguished their parental rights. In this case the State refused to recognize that the Bringles extended family was even entitled to any Constitutional protection, and refused to allow them to participate in the review hearing, and refused to allow them to intervene. In this case the state is relying on a erroneous assessment of the facts and the

Courts refusal to provide a opportunity to be heard for the Bringles was unreasonable. The Bringles could not explain or defend the charges of unfittness asserted against them because state regulations do not require that foster parents be apprised of these allegations. It is entirely possible under these procedures that the court may rely on evidence that the foster parents, if given a opportunity, could either refute or explain. Moreover, since the foster removal decision is not required to be in writing, the foster parent may never know wether the hearing panel mistakenly relied on erroneous information. Finally since the decision of the court is final (at the review hearing) the foster parent cannot challenge that decision in another forum. The risk for error is extremely great under circumstances like this. Especially in the Bringles case

since the state was relying on second hand information and the review hearing was held some 1200 miles away and was far removed from the Bringles and their grandchildrens lives. In Rivera v. Marcus 696 F2d. at 1029 the Court states:

> It is beyond peradventure that the nuclear family is not the only Constitutionally protected family unit---------Juveniles clearly have an interest in steady, continuing relationship with their parents or custodial relatives, and absent evidence of abuse or neglect, the state should ordinarily not intervene in the private realm of family life----------.

The Bringles took excellent care of their grandchildren and provided them with the much needed love and psychological and emotional support that the children needed. The chilrens improvement while in the Bringles care was tremendous, and this was evidenced by a letter from the childrens Doctor stating she recommended that the children should remain with their grandparents. See Appendix.

The Petitioners were recieving AFDC, (Aid to Families with Dependent Children) under 42 U.S.C. & 601 et seq. The Washington State Statute regarding removal of children from homes of relatives is 74.12.310RCW and 74.12.320RCW. The state of Washington did not comply with either of the above statutes for the following reason:

1. No effort was made to improve home conditions (if in fact there was any unsatisfactory conditions that did exist).
2. No search for other relatives was even made pursuant to 74.12.310RCW.
3. The summons and hearing requirements of 13.04.070RCW were not met. (see 74.12.320RCW, removal must be pursuant to 13.04RCW).

The State claims the removal hearing was pursuant to 13.34.210RCW, and no summons or notice of hearing is required to be given Custodial relatives. Therefore the States view families like the Bringles and their

grandchildren as ordinary foster families with no constitutional rights to due process. This conflicts with Rivera v. Marcus 696 F2d. 1016 (1982) (2nd circ.). In Rivera at 1025 the court stated:

> Indeed, we find no legally principled distinction between Mrs. Moores rights in East Cleveland and Mrs. Riveras in Hartford----------.

at 1027:

> The Courts due agree, though that due process fundamentally requires that the aggrieved party be provided with an opportunity to be heard at a meaningful time and in a meaningful manner------ the meaningfulness of the process must be considered in the context of three distinct factors: First the private interest that will be affected by the official action; Second the risk of an erroneous deprivation of such interest through the procedures used---------

Cited in Matthews v. Eldrige, 424 U.S. at 335, 96 S.Ct. at 903..47 L. Ed. 2d.18 (1976). In Regards to the Court of Appeals opinion in appendix, the court states the Bringles chose not to appear at the review hearing.

This is incorrect as the Bringles did not have a choice as they were not notified of the review hearing and did not even know where it was. The State claims they notified the Bringles by phone 7 days before the review hearing, but the Bringles have argued throughout the State Court proceedings that no notice was given them by anyone in Washington or anyone in California. The State also argued throughout the proceedings-that no notice was required. The Court of appeals opinion also states the Bringles did not file in the Washington Courts until three months after the June 24th 1986 review hearing. The State did not notify the Bringles of the June 24th 1986 review hearing orders until August 14th, 1986 almost 2 months after the review hearing. No effort was made by the State to remove the children until August 14,

1986. The State also did not notify the California authorities, who were supervising the placement nor did they advise the Bringles of any rights. Furthermore the Bringles efforts to protect their family did not end in California until August 19, 1986, when the California court refused to grant a restrain-order due to lack of jurisdiction. Even then the Bringles did not have the full scope of what was taking place until they recieved a letter from the Attorney Generals office on September 13, 1986 explaining who was responsible for removing their children. That letter was dated September 11, 1986. The Bringles then promptly filed in the Washington courts on September 16, 1986, approximately 3 days after recieving the letter. Since the Bringles were not notified of the Review hearing orders until August 14, 1986 it would have been imp-

ossible for them to file their objections in the Washington State Courts any sooner. The Court of Appeals opinion also gives the impression that the Bringles just suddenly appeared and challenged the placement of the children in a new pre-adoptive home. However the pre-adoptive home did not even exist until after the children were removed. The opinion also mentions we had contact with our daughter, but does not state the reason why. We contacted her after the State refused to help us with the childrens medical bills and only after we first asked them to contact the natural parents, so we could take advantage of the Military Insurance. The director of patient affairs at George Air Force Base had told us that the children were still entitled to the Military insurance for medical care as long as the natural parents were still in the service, regardless of whether or not the natural parents had relinguished their parental right, but

the only person that could sign them up for the insurance was the natural parents. The Court of Appeals opinion also mentions the Bringles were circumventing any adoption. This stems from the fact that the Bringles tried to go along with a experiment by the caseworkers that would allow the children to be adopted out by a local family that would allow the Bringles a continuing relationship. There were to many serious defects in the plan and the Bringles objected. The Court of Appeals opinion also states intervention was a matter of the courts discretion and not a matter of right. Intervention of right is governed by Washington Court Rule CR 24,(a). That rule states;

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so sit-

> uated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

The Bringles liberty interest in maintaing the stability and integrity of their familial relationship with their grandchildren is substantial and was not adequately represented by the existing parties. The existing parties were all seeking the childrens removal and none of the parties even recognized that the Bringles possessed a liberty interest in protecting their family. Furthermore the existing parties were far removed from the Bringles home and the childrens lives to properly consider the best interest of the children. Since the Bringles had lived with their grandchildren as a family for one full year they certainly had become the two most important people in the childrens lives, and for the court to

make a decision that would no longer allow them to live together as a family, without allowing them a opportunity to be heard is unfair to the children as well as the Bringles. The Court of Appeals opinion also makes reference to a review hearing order dated January 23, 1986, making it appear that the Bringles did not want to adopt their grandchildren. The Bringles were not aware of that order as the last one they recieved was dated September 30, 1985, that order states the Bringles are in the process of adoption and that the adoption process in California takes six months and that the orders for custody should be extended until November 14, 1985. Whether or not a review hearing was held on November 14, 1985 is unclear, however no adoption support was even requested by Washington until late November some three months after

the children were placed in the Bringles home. The California Social Service in a letter to the Washington Social Service Agency dated September 15, 1986 stated:

> In all fairness to the Bringles, the record reflects the children were moved to the Bringles home in August 1985 and no social work intervention was requested by your agency until late November 1985. Essentially, the Bringles were left to cope during the most difficult period of adjustment without any support system. Taking on two young abused children who were frightened and essentially unsocialized is not an easy task with an abundance of help, much less on your own.-------

This letter tried to explain some of the reasons for the stress that the Bringles were having. In any event as the children responded to their grandparents love and care the stress disappeared and should not have been used as a reason for determining that the Bringles were unfit. The children were not

monitored properly by the State and as a result of that a erroneous assessment of the facts was submitted to the courts, which resulted in the childrens removal. This was done without allowing the Bringles any opportunity to challenge allegations or any opportunity to confront and cross examine the caseworker. Once the children were removed they were immediately placed in a pre-adoptive home and no provision was made that would allow the return of the children to the Bringles home if they were later found to be fit for custody. The State proceeded and finalized adoption in June of 1987 while the appeal was still pending, and then argued the Bringles appeal was moot. They further argued that the Bringles

had no right to even appeal. Though the Bringles had filed in the various state courts they were denied due process in all of them. Not one court allowed them the opportunity to intervene and be heard and to cross examine caseworkers, present evidence and to have witnesses testify for them. The State violated its own court rule in regards to intervention and violated its own statute regarding removal of dependent children from homes of relatives. Furthermore the State should have given the Bringles a chance to correct any deficiency in their home that the state was concerned with before they permanently removed their grandchildren.

The Bringles were not responsible for the three month delay in filing motion to intervene, the Washington State Superior Court is responsible as they failed to properly notify the Bringles. They allowed the State to wait until the time for appeal of the June 24, 1986 review hearing had expired before serving the Bringles with a copy of the review hearing orders. Clearly the State of Washington is responsible and not the Bringles. Once the State realized their error they should have allowed the Bringles to intervene. The States contention that telephone notice, even if given, was sufficient to protect the Bringles rights would not meet the test of Matthews v. Eldrige, as cited on page 16 of this Writ. No opportunity was provided at a meaningful time or in a meaningful manner to be heard.

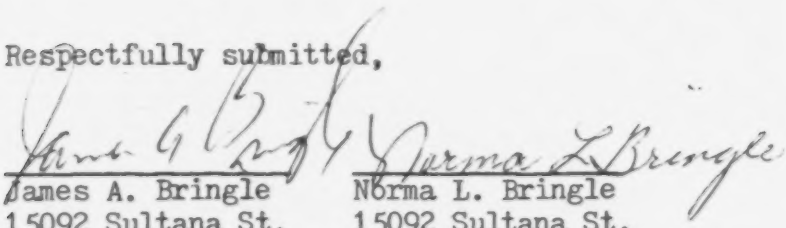
The state errored in removing the Bringles grandchildren pursuant to RCW 13.34.210, it should have been pursuant to 74.12.320 which states removal must be pursuant to chapter 13.04RCW. This requires a summons to the person having custody or control of the child, pursuant to 13.04.070RCW. No summons or notice was ever given to the Bringles. The above statutes would make the Bringles a party and give them a unconditional right to intervene pursuant to CR 24(a) state court rule.
This case presents claims that do not fit neatly into the bodies of law governing the rights of either foster or natural parents. The Bringles had assumed the major role of raising Patrick prior to any State intervention, then after Patrick was returned to the Bringles along with Jennifer they lived as a family for one full year, also the Bringles are biologically related. These unique factors bring the Bringles within the status of "parent".

When the State sought to remove Patrick and Jennifer from the protection and care of their grandparents, (de facto parents), it should have assured that the best interest of the children remain the foremost and ever present consideration. The States failure to allow the Bringles to fully and fairly participate in the review hearing, prevented them from asserting their concern, and that of their grandchildren, that their extended family relationship would not be abruptly severed by the state. The Bringles liberty interest is substantial and was not recognized by the state. The principles of Rivera v. Marcus should be applied to this case.

CONCLUSION

Wherefore, Petitioners prays this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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Dated this 16th day of November 1988.

APPENDIX

Page

Court of Appeals Opinion-------- A

Washington State Supreme Court
Letter denying Review----------L

Letter from Department of the
Air Force (childrens Doctor).----M

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

IN RE THE WELFARE OF PATRICK JAMES
BOLLINGER and JENNIFER LYNN BOLLINGER.
MINORS,

No. 10700-7-II and 10701-5-II

Division Two
Unpublished Opinion

Filed May 18, 1988

PETRICH, J. -- James and Norma Bringle, the maternal grandparents of Patrick and Jennifer Bollinger, appeal an order denying their motion for revision of a dependency review hearing order. Two issues are before us on appeal: (1) whether grandparents have a right to intervene in a dependency proceeding following termination of the natural parents' rights; (2) whether grandparents, with whom their dependent children have been placed, have a right to notice of a dependency review hearing. We conclude that the Bringles do not have a right to intervene in the dependency proceedings.

Therefore, as nonparties, they were not entitled to notice of the dependency review hearing. Petitions for the dependency of Patrick and Jennifer Bollinger were filed October 19, 1984. At that time, Jennifer, age 2 months, was in Madigan Army Hospital suffering from meningitis and several partially healed broken bones. Patrick, age 1 1/2, was staying in California with his Grandparents, the Bringles. The Bringles recieved notice in early December, 1984 that an order would be entered requiring Patrick to be returned to Washington. On December 27, 1984, Patrick was returned to this State and orders of dependency agreed to by the parents were entered for both children. The Bringles filed a motion to vacate the dependency orders and for intervention, as well as a petition for custody of the children. No appeal was taken from the commissioners order denying their

motion, after an unsuccessful attempt at revision. Patrick and Jennifer were placed with the Bringles by court order on August 23, 1985. The order stated that the placement was temporary, pending final approval of the California Department of Social and Health Services. A Washington caseworker monitored the placement through an interstate compact filed with the California authorities. Parental rights to the children were terminated September 17, 1985, and permanent legal custody was granted to the Washington State Department of Social and Health Services. A dependency review hearing was held on January 23, 1986. At that time the court continued placement with the Bringles under the supervision of DSH. The court also ordered that the following services be offered or provided: 1. Coordination of services with San Bernardino County Adoption Services (child with Grandparents in California). 2. Adoption

support if requested by adopting family..... Adoption placement to be sought which would allow both maternal and paternal grandparents to have continued contact with child, if possble. On June 17, 1986, the Washington caseworker telephoned the Bringles and advised them that there would be an early review hearing on June 24, 1986, to determine whether the children should be removed from the Bringles home and returned to the state of Washington. The caseworker, the childrens guardian ad litem, and an assistant attorney general were present at the hearing. The Bringles did not appear personally or through a representative and no attempt was made to postpone the hearing. Upon consideration of the caseworkers report, guardian ad litems report, and oral argument, the court determined it would be in the best interest of the children to be returned to Washington and placed in a pre-adoptive home. The court based its determination on evidence which tended to

show that Mrs. Bringle was unable to handle the stress of caring for two small children, the Bringles were circumventing any other adoption possibilities, and that the childrens mother had been present in the home. After the Bringles unsuccessful attempt in the California court to seek letters of Guardianship of the children and to restrain their removal from California, thechildren were returned to Washington on August 19, 1986. On September 19, 1986, the Bringles served the Washington Department of Social and Health Services with an order to show cause why the June 24, 1986 dependency review order should not be vacated, the adoption proceedings should not be stayed, and the Bringles should not be granted leave to intervene. An order denying motion was entered on October 28, 1986. The Bringles subsequent motion for revision was denied on January 23, 1987, and this appeal followed.[1]

[1] Jennifer and Patrick were adopted pursuant to a decree entered on June 26, 1987. Their dependency proceeding was dismissed on August 5, 1987.

I. Intervention

Intervention of right and permissive intervention are governed by CR 24(a) and (b). The Bringles do not fall within the requirements of CR 24(a) as no statute confers on them an unconditional right to intervene, and they do not have a legal interest which is not adequately represented by the existing parties. See In re Baby Girl Coverdell, 30 Wn. App. 677, 680, 637 P.2d 991 (1981). "....(A) grandparents status does not per se confer an inherent right to custody of a grandchild..." Annot., Award of custody of child where contest is between childs grandparent and one other than childs parent, 30 ALR 3d 290,304 (1970).

The grant or denial of permissive intervention pursuant to CR 24(b) is within the discretion of the trial court and will not be reversed absent a showing of abuse of discretion. State v. Port of Peninsula, 89 Wn.2d 764,767,575 P.2d 713 (1978). CR 24(b), the permissive intervention rule, requires that in exercising its discretion, the court should consider whether the rights of the original parties will be unduly delayed or prejudiced. In conclusion of Law V, the trial court stated: "Intervention by the Bringles in this case is not proper as it would unduly delay and prejudice the rights of the children to be adopted." This conclusion is supported by several findings of fact which are based on substantial evidence contained in the record. An Appellate court will not disturb the findings of the trial court so long as they are supported by substantial evidence. In re Sego, 82 Wn.2d 736, 739,513 P.2d 831 (1973). "This deference to the trial court is particularly important in deprivation proceedings."

In re Hall, 99 Wn.2d 842, 849,664 P.2d 1245 (1983). The trial court did not abuse its discretion in denying the Bringles motion for intervention. The Bringles argue that the cases of In re Maurer, 12 Wn.App. 637, 530 P.2d. 1338 (1975) and In re Coverdell, 39 Wn App. 887, 696 P2d 1241 (1984) (Coverdell II), provide authority for their intervention in the instant case. However, neither case held that grandparents must be allowed to intervene in the dependency proceedings of their grandchildren. We also decline to so hold. In Maurer, the specific issue of intervention was never raised. The grandparents timely moved for a continuance of a deprivation of parental rights proceeding involving their grandchildren. The trial court denied their motion for continuance. The court of appeals remanded the case for a hearing on the grandparents fitness to recieve

custody of the children. In re Maurer, 12 Wn App. at 639-40. In re Coverdell II, the court held that a foster parent was not allowed to intervene in a dependency proceeding. Referring to the Maurer decision, the court stated in a footnote: By this statement we do not mean to overule our decision in In re Maurer (citation Omitted) If a child is found to be dependent or if parental rights are terminated, the foster parent or other custodian should be heard on the issue of custody..... In re Coverdell, 39 Wn App. at 890, n. 2. In the instant case, although the Bringles were not entitled to intervene, they did have a opportunity to be heard on the issue of custody. Their initial motion for intervention was filed more than 16 months prior to the June 24, 1986 hearing. Their second motion was not filed until three months after the hearing at issue in this case. They recieved a courtesy notice of the June 24, 1986

hearing, but chose not to appear and present evidence, not to ask for a continuation and not to move for intervention at that time.

II. Notice

As non-parties, the Bringles had no rights to recieve notice of the June 24, 1986 hearing. The juvenile court has exclusive original jurisdiction of dependency and termination proceedings. RCW 13.04.030. The Superior court will defer determination of custody matters until the juvenile court has fully entertained the dependency matters. See In re the Marriage of Perry, 31 Wn. App. 604, 608, 644 P.2d 142 (1982). The June 24 hearing was a dependency review hearing under RCW 13.34.210. This Statute provides that when parental rights have been terminated and a child has not yet been adopted, the (juvenile) court shall review the case every six months. Contrary to appellants contention the hearing does not fall within the notice requirements of the Uniform Child Custody

Jurisdiction Act. RCW 26.27.010 et seq. The hearing was pursuant to RCW 13.34.210 and falls within the notice requirements provided for in JuCR 11.2 JuCR 11.2 provides that a notice may be given by any means reasonably certain of notifying the party, including telephone. Although the Bringles were not entitled to notice, the June 17, 1986 telephone call by Lenore Martineau, explaining the time and the date of the dependency review hearing would satisfy the notice requirements of JuCR 11.2. Affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Petrich, J.

THE SUPREME COURT
State of Washington

September 1, 1988

Ms. Patricia Cone
5501 Sixth Avenue
Tacoma, Washington 98406

Mr. James Bringle
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Honorable Kenneth O. Eikenberry
Attorney General
Ms. Deborah Mull, Asst.
901 Tacoma Avenue S., Suite 317
Tacoma, Washington 98402

Re: Supreme Court No. 55273-8 - In re the Welfare of Patrick James Bollinger and Jennifer Lynn Bollinger. Court of Appeals No. 10700-7-II.

Counsel: The above entitled petition for review was considered by the Court on its August 31, 1988, petition for review calender. The Petition was denied by order number 181/106 filed on September 1, 1988.

Very Truly Yours

Steven P. Helgeson
Deputy Clerk

DEPARTMENT OF THE AIR FORCE
USAF HOSPITAL GEORGE (TAC)

Reply to Attn of: SGHMP 15 August 86

Subject: Patrick and Jennifer Bollinger, D/S, D/D, ADA

To: Whom It May Concern

1. I am writing this letter to inform you that I have followed these two children, Patrick and Jennifer Bollinger, since 3 September 85 to date. They both have shown tremendous improvement in their behavior since they have been in their grandparents' care. Patrick and Jennifer were very withdrawn, anxious and scared when they first came. But this last visit, they were very cooperative, carried on a conversation, and friendly. Patrick has gained a lot of weight (from 15th % of Last September 85 to 15 % this visit).

2. I recommend that these two children stay with these grandparents so that they could

-M-

continue to develop mentally, emotionally, and psychologically. It would be very traumatic to them if they would be transferred to another home; this might cause them to regress emotionally, lose appetite due to depression, and would eventually fail to gain weight.

3. If I can be of further help, please contact me at 619-269-3853.

Luisa F. Barile, Lt Colonel, USAF, MC
Chief, Pediatrics

(2)

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-868

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

JAMES A. BRINGLE and NORMA L. BRINGLE,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF WASHINGTON, DIVISION II

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

James and Norma Bringle are the maternal grandparents of Patrick and Jennifer Bollinger. The Bringles claim that they were denied their constitutional rights in the Washington State dependency proceedings concerning the Bollinger children. A brief description of Washington State dependency law is necessary to put their claim in context.

Purpose of Dependency Proceedings and Method of Commencement.

Dependency proceedings are judicial proceedings initiated by the state to protect children from parental abuse, neglect, or abandonment. Parents are entitled to a hearing within seventy-two hours of the filing of a Dependency Petition and to appointment of counsel if indigent. A Guardian Ad Litem may be appointed for the children. Absent agreement of the parties, a bench trial will be held to determine if the children are dependent. If dependency is established, the court will enter a dispositional order determining the children's placement and the plan to reunify the family. A dependent child is a ward of the court and the court assumes supervision. See generally Wash. Rev. Code ch. 13.34.

Review Hearings in Dependency Proceedings.

The court reviews the overall situation, including efforts to reunify the family, at least every six months. See Wash. Rev. Code § 13.34.130. If the family cannot be reunified, the state may file a petition for termination of parental rights. It is important to note that dependency proceedings are not general custody proceedings; rather they focus on the parent-child relationship. Separate statutes govern guardianship, third-party custody, and adoption actions. Wash. Rev. Code ch. 11.88 (guardianship), ch.26.09 (third party custody), ch. 26.33 (adoption).

Commencement of These Proceedings.

The State of Washington filed dependency petitions on behalf of the Bollinger children on October 19, 1984 following allegations of abuse and neglect. CP 1-2; RSCP 151-152.[1]

The parents entered into an Agreed Order of Dependency with the state placing the children in foster care care under DSHS supervision on December 27, 1984. CP 3-6; RSCP 145-147.

The Bringles, who live in California, hired a local Wash-

[1] Petitioner's clerk's papers below are designed as "CP." Respondent's supplemental clerk's papers below are designated as "RSCP."

ington attorney and moved to intervene and vacate the dependency orders on February 11, 1985. CP 2-10. The motions were denied by a court commissioner on April 3, 1985 and by a superior court judge on August 30, 1985. CP 31, 33-34.

At a hearing on May 13, 1985, the court continued the foster care placement and ordered DSHS to contact the State of California to determine if the Bringles could care for the children. RSCP 155-157.

On August 15, 1985, the Bollingers relinquished their parental rights to their children. RSCP 134-139. They consented to their children's adoption and did not designate an adoptive family. RSCP 134-139.

On August 23, 1985, the children were placed in the temporary custody of the Bringles. The placement was temporary pending final approval by California through a home study report. CP 32. On January 23, 1986, the court continued the children's placement with the Bringles and ordered DSHS to seek an adoption placement which would allow all grandparents to continued contact with the children, if possible. CP 123-125.

The June 24, 1986 Review Hearing and its Aftermath.

The court set an early review hearing at DSHS request for June 24, 1986. CP 126-129. It is this review hearing of which the Bringles now complain. On June 17, 1986, the DSHS caseworker phoned the Bringles and told them there would be a hearing on June 24, 1986 where DSHS would recommend return of the children to the State of Washington. CP 139-140; RSCP 90-91. On or around June 16, 1986, Assistant Attorney General Deborah Mull telephoned the Bringle's prior counsel to determine if he still represented the Bringles and to inform him the state was seeking the return of the children. RSCP 118-121.

The Bringles did not appear at the hearing on June 24, 1986. Upon the recommendations of DSHS and the children's Guardian Ad Litem, the court ordered that the chil-

dren be returned to Washington and be placed in a pre-adoptive home. CP 35; RSCP 123.

The DSHS caseworker recommended the change because the Bringles were not a suitable placement for the children. Mrs. Bringle told California authorities that she could not manage the stress of caring for both children. She added that her spouse had threatened he would never forgive her if she did anything to cause the childrens' removal. In March, 1986, the Bringles placed the children with the Derrick family who guaranteed visits for the Bringles. On May 15, 1986, Mrs. Derrick told California authorities that she could not care for the children because of Mrs. Bringle's attitude toward them. RSCP 128-130. The court was also advised by DSHS that the Bringles would continue to interfere with any placement prospects in California, that the children's safety was at risk because their abusive mother had been in the Bringles' home, and that the children would have a better opportunity for adoption in Washington. RSCP 108-115.

On July 16, 1986, the Bringles petitioned for the Appointment of a Temporary Guardian in California without giving notice to DSHS. The California temporary guardianship order was vacated on August 11, 1986 because DSHS did not receive proper notice. RSCP 76-77.

The Bringles reset the matter for hearing in California on August 19, 1986, giving DSHS four hours notice. After hearing arguments, the court dismissed the Guardianship Petition, held that California did not have jurisdiction to hear the case, and ordered the children be returned to Washington. RSCP 177. The children were placed in a pre-adoptive foster home in Washington. CP 35; RSCP 123.

On September 19, 1986, the Bringles with their former counsel filed an action seeking to intervene, to vacate the June 24, 1986 order, to stay the adoption proceeding and to return the children to their care. CP 56-57.

Following a hearing on October 9, 1986, the court commissioner denied the Bringles' motions. CP 73-78; RSCP 66-71. The Bringles moved to revise the commissioner's ruling. CP 79. Judge Arthur Verharen heard the matter and denied the Bringles' motions, adopting the commissioner's Findings

of Fact, Conclusions of Law and Order entered on October 28, 1986. CP 2104-105; RSCP 51-52.

On February 2, 1987, the Bringles appealed the judge's ruling. CP 106. The Court of Appeals affirmed the ruling by written decision dated May 18, 1988. The Bollinger children were adopted by decree entered June 26, 1987. See Decree of Adoption in Cause No. 87-5-00144-2, Superior Court of the State of Washington for Kitsap County. The children's dependency actions were dismissed on August 5, 1987. See Motion and Order Dismissing Dependency in Cause Nos. 131566/131567, Superior Court of the State of Washington for Pierce County.

ARGUMENT

I. The issues are now moot.

The Bollinger children have now been adopted. The Bringles do not appear to contest the validity of this adoption. Instead, the Bringles claim that they were denied notice and opportunity to address the removal of the children from their care. If the Bringles wanted permanent custody and control of their grandchildren, they could have filed an adoption, guardianship, or a third-party custody action in Washington. This they never did. Now that a permanent and stable home has been found and the children are adopted, this Court should not consider the Bringles' request to be temporary caretakers. RSCP 128-130, CP 65-67.

II. The Court's decision below was correct.

The Bringles had notice and an opportunity to be heard at the pivotal hearing of June 24, 1986. The Bringles were notified of the hearing by the DSHS caseworker one week earlier. The caseworker told the Bringles that she would seek return of the children to Washington. In addition, the state's attorney contacted the Bringles' former counsel and informed him a hearing was forthcoming. The Bringles were given notice and opportunity to appear at the hearing to contest the children's removal. Their rights were not violated

since they decided not to exercise their opportunity to appear at the hearing.

Rivera v. Marcus, 696 F.2d 1016 (2nd Cir. 1982) is distinguishable from the facts of this case. In *Rivera*, the court held that an adult half-sister who had cared for dependent children for the first six years of their lives was entitled to notice and opportunity to contest the removal of the children from her care. The court characterized their relationship as "surrogate mother" and "surrogate children" since the children knew no other parent. 696 F.2d at 1025-1028.

The Bringles are not "surrogate parents." In addition to their parents, the Bollinger children have lived with foster parents, pre-adoptive families and the Bringles. Their interest, if any, did not approach the interest protected in *Rivera*. Their involvement was only as temporary caretakers.

The *Rivera* court required notice and an opportunity to be heard. 696 F.2d at 1028. The Bringles received timely and adequate notice of the reasons for removal, the opportunity to retain counsel and the opportunity to appear at the hearing. At the June 24, 1986 hearing, the court decided to return the children to Washington State after hearing the arguments and evidence presented by DSHS and the children's Guardian Ad Litem. The Bringles ignore the facts by claiming that they did not have notice of the June 24, 1986 hearing.

CONCLUSION

The Bringles' case is based upon a misstatement of the facts below to justify a continuing interference into the lives of the Bollinger children. This court should deny the Petition for Certiorari.

Respectfully submitted this 17th day of March, 1989.

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NO. 88-868

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

JAMES A. BRINGLE and
NORMA L. BRINGLE, Petitioners,

vs.

WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,
et al., Respondent.

PETITION
FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS STATE
OF WASHINGTON DIVISION II

REPLY BRIEF

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F 2d 1539 (11th Cir.1984)(interference with dating relationship actionable under & 1983). Moreover the freedom of intimate association protects associational choice as well as biological connection. See Jaycees, 104 S.Ct. at 3249-51; See generally, Karst, "The Freedom of Intimate Association," 89 Yale L.J. 624 (1980).

2. Notice was difficient and the washington state court of appeals was in error when it ruled that no notice was even required to be given to the Bringles. This opinion is in conflict with the Washington State Code Chapter 74.12.300, 74.12.310 and 74.12.320 and Chapter 26.27.050, and also does not comply with the federal statute 28 U.S.C. & 1738A furthermore the court of appeals opinion would not be consistant with Title IV of the Social Security Act (42 U.S.C. & 601 etc.). Also the states contention that no notice was required conflicts with River v Marcus and Drollinger v Milligan. The Bringles relationship with their grandchildren does fall within the constitutionally protected range and since the review hearing was held out of the Bringles

and their grandchildrens home state and where the Bringles were not parties and their privacy interst were being impaired with out a fair opportunity to respond even if the state gave them 7 days notice would not seem fair. Though the Bringles cited through out the state court proceedings that they believed they had a liberty interest in protecting their family and argued that their due process rights were violated. The court ignored claim for consttutional protection and would not even acknowledge the existence of the constitutional principle on which the Bringles were basing their claim. No where in the court of appeals opinion or the lower courts does the state mention the Bringles consttutional claim only now are they beginning to acknowledge that it could exist. The fact finding procedures employed by the state Courts were not adequate to afford a full and fair hearing. There for the Bringles did not recieve a unencumbered full and fair and adequate hearing in the state court and the Bringles were otherwise denied due process of law in the state court proceeding.

The state claims the dependency hearing was pursuant to 13.34.210 (see RB page 2). That statute apparently does not provide for constitutional protection of custodial relatives interest in maintaining the stability and integrity of the familial relationships that they have. That law would appear to be unconstitutional when applied to custodial relatives living out of state for a long period of time and that statute would also appear to be inadequate in practice and also inadequate to allow full litigation of a constitutional claim. We might also note that the Bringles did file a 42 U.S.C. & 1983 action in the United States District Court Western District of Washington Case No C88-267T The Bringles were seeking declatory relief. Case was dismissed under principles of res judicata on February 3rd 1989 even though no inquiry was made regarding evidence to support the states contention that the Bringles constitutional rights were fully litigated in the state court. The Bringles are appealing this to the 9th circuit court of appeals.

3. Mis-Stated information- (refer to RB page 4). The remarks regarding the stress and spouses statement are not correct. That information was provided by a california caseworker who later recanted that information but the state would not except any new evidence and ignored the letter from the California Social Service Department trying to explain that. Also on page 4 of respondents Brief it states the Bringles placed their grandchildren with the derrick family in March 1986. This is a totally false statement as the Bringles never placed their grandchildren with the derricks or any one else. The children never spent one night with the derricks or anyone else during the one year they lived with the Bringles in California. The derricks were someone that the social services were considering as alternate placement if the Bringles decided to try the experiment that was suggested by the caseworkers. However the plan never worked. The state distorted this information to make it appear the children were not in a stable home. Also on page 4 of (RB) it states

the childrens safety was at risk. The childrens safety was never at risk and there is no evidence in the state record to even remotely suggest this. Statements like these have done the Bringles extreme harm and have prejudiced the courts to the point that they would never even allow us a full and fair hearing. Apparently the states courts by accepting the hearsay evidence as facts decided the Bringles were not good enough to be allowed to live with their grandchildren and permanently terminated their familial association.

4. Issue is not moot the Bringles did contest the adoption. They asked for a stay of adoption in juvenile court and filed a motion in court of appeals to have adoption stayed but before court could act the state finalized the adoption. They also asked the State Supreme Court to vacate the review hearing adoption order. The state now claims the Bringles could have filed for guardianship in the state of Washington (see page 5 RB) if they wanted permanent custody indeed we did file for guardian ship in California In july of 1986 pursuant to

28 U.S.C. & 1738A because according to that statute the state of washington no longer had continuing jurisdiction (see & 1738A (d)). The state of Washington did not meet the requirements necessary to sustain jurisdiction. The children had lived with their granparents in California for one year with no connection or any visitation by anyone in the state of washington. The review hearing did make a custody determination that should have been made in the childrens home state pursuant to Washingtons own statute Chapter 26.27.030 and also pursuant to 28 U.S.C. & 1738A. The state is misapplying the meaning of the Uniform Child Custody act saying there was no dispute over custody, indeed there was a dispute over custody.

5. The courts decision below was not correct (refer page 5 RB). No notice was given the Bringles and they could not have decided not to exercise their opportunity to appear if they did not know about the hearing. Even if the Bringles were given telephone notice as the state claims the opportunity would not have been fair since the hearing was

held some 1200 miles from the Bringles and their grandchildrens homestate and would have been impossible for the Bringles and their grandchildren to have friends, relatives, childrens Doctor and other important wittnesses testify. The Bringles are not seeking temporary caretaker status as the state claims on page 5 (RB). The state also are implying that a former attorney of the Bringles in Washington who helped them in there original efforts to obtain custody had knowledge of the time and date of the hearing and that he notified the Bringles. (see RB page 5) This is misleading and the Bringles former attorney submitted a affidavit in the Juvenile court stating he did not believe it was proper as he was not retained by the Bringles and he further stated in the affidavit that the state did not notify him of the time and date and that the state told him they would serve the Bringles direct in California but they never did. On page 5 of Respondents Brief there is little merit to the states conclusion that the Bringles are not surrogate parents as was Rivera. The Bringles were

the only family the children could have possibly known. The childrens ages were 1 year and 2 years of age at time the Bringles recieved custody. The state is completely mistating the facts in regards to placement in pre-adoptive home. At no time prior to or during the one year the children lived with their grandparents did they ever live in a pre-adoptive home. Any disruptions in their lives was caused by Washington. They ordered Patrick back to washington only to return him 8 months later and then after living in stable home with his grandparents and his sister for one full year the state ordered him back to Washinton state again. The Bringles involvment was not just temporary caretakers. The children were placed with their grandparents for the purpose of adoption, the state is trying to dispute the intent by saying it was only temporary. However the state cannot deny what the real intent was. The facts do not support justifying the breaking up of the Bringles extended family by the state.

CONCLUSION

The Bringles do have strong liberty interest and are not merely trying to interfere into the lives of their grandchildren. They are trying to restore their extended family. The passage of time does not diminish their liberty interest in protecting the stability and integrity of their familial relationship with their grandchildren. The Bringles are not responsible for this long delay and are entitled to due process of law. This Court should grant petition for Certiorari.

Respectfully submitted this 21st day of March 1989.

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